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Supreme Court, U.S.
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No. 98-1506

In The

Supreme Court of the United States

DONALD D. BARRY, ESQ., et al.,

Petitioners,

vs.

McSHARES, INC., d/b/a
RESEARCH PRODUCTS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Kansas

REPLY BRIEF OF PETITIONERS

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ARGUMENT IN REPLY

I. The Federal District Court Determined Probable Cause Existed To Continue The Underlying Antitrust Action

In its claim that a state action would not be a collateral attack on the federal case and determinations, McShares seeks to focus solely on the judgment entered on the jury verdict in its favor in the underlying antitrust case. McShares ignores all the rulings and determinations of the Federal District Court Judge, including denial of McShares' Motions for Summary Judgment, Dismissal and Directed Verdict. These other rulings and determinations of the Federal District Court, acting within its exclusive jurisdiction, are those which McShares is collaterally attacking and which are preempted from state review as set forth in the Petition for a Writ of Certiorari.

An examination of selected findings from the Federal District Court in the underlying action demonstrates the Federal District Court's determinations.

> Construed in light most favorable to plaintiffs, the record creates a fact issue with respect to whether Detia Degesch, Degesch America, Research Products (McShares) and Pestcon were conspiring in 1988 and 1989 to maintain and/or coordinate a decline in prices. Evidence of this conspiracy combined with Bernardo's entry into the market charging substantially lower prices (at well below $340.00 a case) defendant's concerns that Bernardo's low prices were "screwing up" the market and that defendants would have to get Bernardo "in line," and Jerry Sullivan's statement that in order to let distributors compete Degesch America would have to sell to

> them at $340.00 a case, **supports a reasonable inference that but for the alleged conspiracy to charge then higher prices, defendant's competitive prices would have been lower than what they were currently charging.**

In re Aluminum Phosphide Antitrust Litigation, 905 F.Supp. 1457, 1468 (D. Kan. 1995), *emphasis added*. The Federal District Court set forth certain facts supporting allegations of a price-fixing conspiracy. *Id.* at 1466-67. The Federal District Court recognized that by May and June of 1988, evidence suggested that four firms dominated the aluminum phosphide market, including McShares, d/b/a Research Products, and that McShares, with two others, engaged in continuous communications related to pricing. *Id.* at 1461, 1466.

Comity, Federalism, Inherent Powers And Avoidance Of Forum Shopping

While courts have examined the issue of precluding state courts from second-guessing federal courts in subsequent state actions, under a preemption analysis, the same rationale and compelling logic can also be found in cases that held such state court review of an area of federal jurisdiction violates well-established principles of comity and federalism, thereby detracting from the inherent powers granted to federal courts. *Thomason v. Lehrer*, 183 F.R.D. 161, 171-72 (D. N.J. 1998).

In *Thomason*, the Federal District Court Judge held that one who seeks to assert an abuse of process claim against an attorney-adversary, based upon conduct which occurred in a case that had been pending before a United

States District Court, must seek redress in the Federal District Court, and not in state court. *Id.* at 163.

Federal District Courts are vested with inherent powers enabling them to fashion appropriate remedies to uphold the integrity of federal judicial proceedings and oversee the conduct of attorneys who practice before them. *Id.* at 169. "The central component of this broad grant of authority embodied in the inherent powers of federal courts is the principle that a District Court is the appropriate forum in which to seek redress for the alleged abuses of its processes." *Id.* at 170, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

Permitting a state court to inquire into the propriety of pleadings filed in a case pending before a federal court would upset the delicate balance struck by the venerable policies of comity and "what Justice Black described as 'our federalism.' " *Thomason*, 23 F.R.D. at 171, citing *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). The fundamental principles of comity instruct federal and state courts to avoid infringing upon each other's prerogatives. *Thomason*, 183 F.R.D. at 171. The *Thomason* Court held that permitting attorneys to harass their federal court adversaries in a collateral state court proceeding would encourage forum shopping, judge shopping, and the multiplication of litigation. *Id.* at 172. Adopting a rule prohibiting such cases from being filed in the state court conserves state judicial resources and avoids the evils of judge shopping and forum shopping. *Id.* at 172. "[I]t is perfectly consistent with principles of comity and the conservation of judicial resources to require litigants . . . to seek relief solely in the court where the alleged transgression occurred." *Id.*

Where an allegedly frivolous federal cause of action was asserted in federal court, to seek redress for such "litigation abuse," a party must pursue the available federal remedies in federal court. *Mruz v. Caring, Inc.*, ___ F.Supp. ___, 1999 WL 152356 at *7 (D. N.J. 1999).

> Because the allegedly frivolous cause of action . . . was based on federal law, the Attorney Defendants' right to seek attorneys' fees and costs can only arise from the allegedly frivolous federal claim. Thus, under the circumstances of this case, the Attorney Defendants' right to seek attorneys' fees and costs is based on federal, not state law. Consequently, to obtain the relief they seek, the Attorney Defendants must pursue their federal remedies.

Id. at *8. See also *Reitz v. Dieter*, 840 F.Supp. 353 (E.D. Pa. 1993); *Jones v. Credit Bureau of Garden City, Inc.*, 703 F.Supp. 897, 898-99 (D. Kan. 1988).

The *Mruz* court held that,

> because the jurisdictional basis supporting Plaintiffs' alleged frivolous claim was this Court's federal question jurisdiction, the Attorney Defendants must avail themselves of the federal remedies available to recover the attorneys' fees and costs. . . . Accordingly, because the Attorney Defendants may not assert a state law cause of action to recover attorneys' fees and costs associated with defending against a federal claim in federal court, I shall grant [the] motion to dismiss. . . .

Mruz, 1999 WL 152356 at *10.

In light of the determinations by the Federal District Court, overruling McShares' Motion to Dismiss, for Summary Judgment and Directed Verdict, together with the

decision of the Federal District Court to submit the matter to a jury, such matters of probable cause and improper purpose have been conclusively determined by the federal court. Any requests for attorneys' fees and costs or allegations of a lack of probable cause should have been raised in the underlying suit before the Federal District Court.

The Probable Cause Required To Get To A Jury Is Greater Than That Needed To Survive A Malicious Prosecution Or Abuse Of Process Claim

The probable cause required by a federal court to permit a matter to go to jury and survive dispositive motions, requires, of a necessity, a higher level of probable cause than is needed in Kansas to survive a claim for malicious prosecution. The Kansas Supreme Court recently held:

> Probable cause for instituting a proceeding exists when there is a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the belief that the party committed the act of which he or she is complaining.

Bergstrom v. Noah, 974 P.2d 520, 1999 WL 112030 at *6 (Kan. 1999).

> If the legal validity of a claim is uncertain, the question is not whether the person bringing the claim is correct in believing that the Court would sustain the claim, but rather it is whether that person's opinion that there was a sound chance that the claim might be sustained was a reasonable one.

Id.

The Federal District Judge, in the underlying case, determined that the evidence "supports a reasonable inference that but for the alleged conspiracy to charge then higher prices, defendants' competitive prices would have been lower than what they were currently charging." *Aluminum Phosphide Antitrust Litigation*, 905 F.Supp. at 1468. Permitting a state collateral review of such determinations, arising from exclusively federal questions, violates the principles of comity and are preempted.

II. McShares' Cases Are Distinguishable

Several of the cases upon which McShares relies were discussed and distinguished in the Petition for a Writ of Certiorari and will not be readdressed here. Of the other cases raised by McShares, none addresses the issue raised for review in the Petition for a Writ of Certiorari and are distinguishable by their facts or procedural posture.

California v. ARC America Corporation, 490 U.S. 93 (1989), held, as Congress had not undertaken to provide antitrust protections to indirect purchasers, that states could do so without interfering with the federal antitrust laws. That holding does not conflict in the least with preemption when the underlying case was based solely on federal antitrust law. McShares' reliance on *Berg v. Leason*, 32 F.3d 422 (9th Cir.1994), is likewise not availing. *Berg* was a removal case and, like the other cases McShares principally relies on, was a case involving concurrent federal and state jurisdiction. *Id., see Simpson Electric Corp. v. Leucadia, Inc.*, 72 N.Y. 2d 450, 461, 534 N.Y. S. 2d 152, 530 N.E. 2d 860, 865 (1988) (RICO actions are unlike federal antitrust actions as RICO claims, unlike

antitrust, do not enjoy exclusive federal jurisdiction). The *Berg* case possessed only a "tangential federal element." *Berg*, 32 F.3d at 426. The *Berg* case did not involve an analysis under Rule 11 nor preemption. *Id.*

McShares alleges that under *Berg*, the Ninth Circuit case, all Kansas trial courts need do in the malicious prosecution case is to make a determination as to whether or not the underlying federal complaint filed in the underlying antitrust action was "legally tenable." (Brief in Opposition at 15.) However, any such state determination would be a redetermination of the probable cause analysis and findings already made by the Federal District Court as exemplified in the partial summary judgment decision. *Aluminum Phosphide*, 905 F.Supp. 1457.[1]

McShares seeks to convert what should have been a straightforward analysis by the Federal District Court into a separate, expensive and extensive state court action. It is agreed that Rule 11 is not a federal common law tort of malicious prosecution but this does not permit state malicious prosecution law to determine issues that fall solely within the control of the federal court and Rule 11.

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[1] Because these issues of probable cause were decided in the underlying case, a redetermination would also be barred by collateral estoppel.

III. Conclusion

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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